

22-1786

**United States Court of Appeals
for the Seventh Circuit**

A.C., a minor child by his next friend, mother and legal guardian, M.C.,
Plaintiff-Appellee,

v.

METROPOLITAN SCHOOL DISTRICT OF MARTINSVILLE and FRED KUTRUFF,
in his official capacity as Principal of John R. Wooden Middle School,
Defendants-Appellants.

On Appeal from the United States District Court for the Southern District
of Indiana, Indianapolis Division District Court No. 1:21-cv-2965-TWP-MPB,
The Honorable Tanya Walton Pratt, Chief Judge

**BRIEF FOR STATES OF NEW YORK, WASHINGTON, CALIFORNIA,
COLORADO, CONNECTICUT, DELAWARE, HAWAI'I, ILLINOIS,
MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA,
NEVADA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OREGON,
PENNSYLVANIA, RHODE ISLAND, AND VERMONT, AND
THE DISTRICT OF COLUMBIA, AS AMICI CURIAE
IN SUPPORT OF APPELLEE**

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Dated: August 2, 2022

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INTERESTS OF THE AMICI STATES

The States of New York, Washington, California, Colorado, Connecticut, Delaware, Hawai'i, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, and Vermont, and the District of Columbia, file this brief as amici curiae in support of plaintiff-appellee A.C. *See* Fed. R. App. P. 29(a)(2).

Amici States strongly support the right of transgender people to live with dignity, be free from discrimination, and have equal access to education, government-sponsored opportunities, and other incidents of life, including equal access to school restrooms. Discrimination on the basis of one's transgender status causes tangible economic, educational, emotional, and health harms. To prevent these injuries, the amici States have adopted policies aimed at combating discrimination against transgender people. Amici submit this brief to describe their experiences with administering such policies—including policies that maintain gender-segregated restrooms while allowing transgender students to use such restrooms on an equal basis with other students of the same sex. As amici's experiences show, ensuring transgender people have access to public facilities consistent with their gender identity—including access to common restrooms—benefits all, without compromising safety or privacy, or imposing significant costs.

The amici States also share a strong interest in seeing that federal law is properly applied to protect transgender people from discrimination. This appeal does not challenge the authority of a school district to assign bathrooms based on sex, although that is how the Metropolitan School District of Martinsville (District) and its amici characterize the issue. *See* Appellants' Br. (Br.) at 10-18; Amicus Br. of Ind. & 20 Other States (Ind. Br.) at 3-6. Rather, this case challenges the District's policy excluding a transgender male student, A.C., from the boys' bathroom based on his sex assigned at birth, despite A.C. taking medication to suppress menstruation, being known in Indiana state records by a traditionally masculine name, and being referred to as "he" or "him," even by school officials. *See* Br. at 6 n.3. The District's policy violates Title IX of the Education Amendments of 1972 by denying transgender boys and girls access to the same common restrooms that other boys and girls may use. Further, because the policy fails to advance any legitimate interest such as protecting public safety or personal privacy, its only function is to stigmatize a particular group, which violates equal protection.

ARGUMENT

I. PROTECTING TRANSGENDER PEOPLE FROM DISCRIMINATION CONFERS WIDE SOCIETAL BENEFITS WITHOUT COMPROMISING THE PRIVACY OR SAFETY OF OTHERS

Over 1.6 million people in the United States—including approximately 300,000 youth between the ages of thirteen and seventeen—identify as transgender.¹ Transgender people have been part of cultures worldwide “from antiquity until the present day.”² They contribute to our communities in myriad ways, including as students, teachers, essential workers, firefighters, police officers, lawyers, nurses, and doctors.

Unfortunately, transgender people often experience discrimination that limits their ability to realize their potential. To combat such discrimination, States began providing civil rights protections for transgender people nearly a quarter century ago. Today, at least twenty-two States and the District of

¹ Jody L. Herman et al., *How Many Adults and Youth Identify as Transgender in the United States?* 1 (Williams Inst. 2022) (internet). (For authorities available online, full URLs appear in the table of authorities. All URLs were last visited on August 2, 2022.)

² American Psych. Ass’n (APA), *Answers to Your Questions About Transgender People, Gender Identity, and Gender Expression* 1 (3d ed. 2014) (internet); see also APA, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 Am. Psych. 832, 834 (2015) (internet).

Columbia,³ and at least 225 local governments,⁴ offer express protections against discrimination based on gender identity in areas such as education, housing,

³ **California:** Cal. Civ. Code § 51(b), (e)(5) (public accommodations); Cal. Educ. Code §§ 220 (education), 221.5(f) (education and school athletic participation); Cal. Gov't Code §§ 12926(o), (r)(2), 12940(a), 12949 (employment); *id.* § 12955 (housing); Cal. Penal Code §§ 422.55, 422.56(c) (hate crimes). **Colorado:** Colo. Rev. Stat. § 24-34-301(7) (definition); *id.* § 24-34-402 (employment); *id.* § 24-34-502 (housing); *id.* § 24-34-601 (public accommodations). **Connecticut:** Conn. Gen. Stat. § 10-15c (schools); *id.* § 46a-51(21) (definition); *id.* § 46a-60 (employment); *id.* § 46a-64 (public accommodations); *id.* § 46a-64c (housing). **Delaware:** Del. Code Ann. tit. 6, § 4501 (public accommodations); *id.* tit. 6, § 4603(b) (housing); *id.* tit. 19, § 711 (employment). **Hawaii:** Haw. Rev. Stat. § 489-2 (definition); *id.* § 489-3 (public accommodations); *id.* § 515-2 (definition); *id.* § 515-3 (housing). **Illinois:** 775 Ill. Comp. Stat. 5/1-102(A) (housing, employment, access to financial credit, public accommodations); *id.* 5/1-103(O-1) (definition). **Iowa:** Iowa Code § 216.2(10) (definition); *id.* § 216.6 (employment); *id.* § 216.7 (public accommodations); *id.* § 216.8 (housing); *id.* § 216.9 (education). **Kansas:** Kansas Hum. Rts. Comm'n, *Kansas Human Rights Commission Concurs with the U.S. Supreme Court's Bostock Decision* (Aug. 21, 2020) (internet) (advising that Kansas laws prohibiting discrimination based on “sex” in “employment, housing, and public accommodation” contexts “are inclusive of LGBTQ and all derivatives of ‘sex’”). **Maine:** Me. Rev. Stat. Ann. tit. 5, § 4553(9-C) (definition); *id.* § 4571 (employment); *id.* § 4581 (housing); *id.* § 4591 (public accommodations); *id.* § 4601 (education). **Maryland:** Md. Code Ann., State Gov't § 20-304 (public accommodations); *id.* § 20-606 (employment); *id.* § 20-705 (housing); Md. Code Ann., Educ. § 26-704 (schools). **Massachusetts:** Mass. Gen. Laws ch. 4, § 7, fifty-ninth (definition); *id.* ch. 76, § 5 (education); *id.* ch. 151B, § 4 (employment, housing, credit); *id.* ch. 272, §§ 92A, 98 (public accommodations) (as amended by Ch. 134, 2016 Mass. Acts). **Minnesota:** Minn. Stat. § 363A.03(44) (definition); *id.* § 363A.08 (employment); *id.* § 363A.09 (housing); *id.* § 363A.11 (public accommodations); *id.* § 363A.13 (education). **Nevada:** Nev. Rev. Stat. §§ 118.075, 118.100 (housing); *id.* §§ 613.310(4), 613.330 (employment); *id.* §§ 651.050(2), 651.070 (public accommodations). **New Hampshire:** N.H. Rev. Stat. Ann. § 354-A:2(XIV-e) (definition); *id.* § 354-A:6 (employment); *id.* § 354-A:8 (housing); *id.* § 354-A:16 (public accommodations); *id.* § 354-A:27 (education). **New Jersey:** N.J. Stat. Ann. § 10:5-5(rr) (definition); *id.* § 10:5-12 (public accommodations, housing, employment); *id.* § 18A:36-41 (directing issuance of guidance to school districts permitting transgender students “to participate in gender-segregated school activities in accordance with the student’s gender identity”). **New Mexico:** N.M. Stat. Ann. § 28-1-2(Q) (definition); *id.* § 28-1-7(A) (employment); *id.* § 28-1-7(F) (public accommodations); *id.* § 28-1-7(G) (housing). **New York:** N.Y. Exec. Law §§ 291, 296 (education,

(continued on the next page)

public accommodations, and employment.⁵ The experiences of amici States and other jurisdictions show that policies and practices that ensure equal access to public facilities for transgender people—including access to common restrooms consistent with their gender identity—promote safe and inclusive school environments that benefit all.

employment, public accommodations, housing). **Oregon:** Or. Rev. Stat. § 174.100(4) (definition); *id.* § 659.850 (education); *id.* § 659A.006 (employment, housing, public accommodations). **Rhode Island:** 11 R.I. Gen. Laws § 11-24-2 (public accommodations); 28 R.I. Gen. Laws §§ 28-5-6(11), 28-5-7 (employment); 34 R.I. Gen. Laws §§ 34-37-3(9), 34-37-4 (housing). **Utah:** Utah Code Ann. § 34A-5-106 (employment); *id.* § 57-21-5 (housing). **Vermont:** Vt. Stat. Ann. tit. 1, § 144 (definition); *id.* tit. 9, § 4502 (public accommodations); *id.* tit. 9, § 4503 (housing); *id.* tit. 21, § 495 (employment). **Washington:** Wash. Rev. Code Ann. § 28A.642.010 (education); *id.* § 49.60.030(1)(a)-(e) (employment, public accommodations, real estate transactions, credit transactions, and insurance transactions); *id.* § 49.60.040(27) (definition); *id.* § 49.60.180 (employment); *id.* § 49.60.215 (public accommodations); *id.* § 49.60.222 (housing). **District of Columbia:** D.C. Code § 2-1401.02(12A) (definition); *id.* § 2-1402.11 (employment); *id.* § 2-1402.21 (housing); *id.* § 2-1402.31 (public accommodations); *id.* § 2-1402.41 (education).

⁴ Human Rts. Campaign, *Cities and Counties with Non-Discrimination Ordinances That Include Gender Identity* (internet) (current as of January 28, 2021).

⁵ The U.S. Supreme Court has confirmed that longstanding federal law similarly prohibits employment discrimination based on gender identity. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1742-43 (2020).

A. Transgender Youth Face Pervasive and Harmful Discrimination That Causes Them Serious Health and Academic Harms.

Transgender youth experience levels of discrimination, violence, and harassment that exceed those experienced by their cisgender counterparts.⁶ In the 2015 U.S. Transgender Survey (USTS), the largest survey of transgender people to date, 77% of respondents who were known or perceived as transgender in grades K-12 reported negative experiences at school, including being harassed or attacked.⁷ More than half of transgender students (54%) reported verbal harassment, almost a quarter (24%) reported suffering a physical attack, and approximately one in eight (13%) reported being sexually assaulted.⁸ Another 2015 survey showed that three-fourths of transgender students felt unsafe at school because of their gender expression.⁹ More than a quarter of transgender respondents to a survey of LGBTQ teenagers in December 2016 and January

⁶ Joseph G. Kosciw et al., *The 2019 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools* xxvii, 93 (GLSEN 2020) (internet); see also Emily A. Greytak et al., *Harsh Realities: The Experiences of Transgender Youth in Our Nation's Schools* xi (GLSEN 2009) (internet).

⁷ Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey* 131-35 (Nat'l Ctr. for Transgender Equal. 2016) (internet).

⁸ *Id.* at 132-33.

⁹ Joseph G. Kosciw et al., *The 2015 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools* 84-85 (GLSEN 2016) (internet).

2017 reported being bullied or harassed within the past thirty days.¹⁰ As a consequence of this violence and harassment, transgender students surveyed in 2019 reported feeling less connected to their schools, and had less of a sense of belonging, than other students.¹¹

Discrimination against transgender youth—including denial of access to appropriate restroom facilities—can have serious health and academic consequences. LGBTQ students who experienced discriminatory policies or practices in school were found to have lower self-esteem and higher levels of depression than students who had not encountered such discrimination.¹² Respondents to the 2015 USTS who reported negative experiences in grades K-12 were more likely than other respondents to be under serious psychological distress, to have experienced homelessness, and to have attempted suicide.¹³ Transgender people attempt suicide at a rate nearly nine times that of the general population.¹⁴ And a 2016 study found that transgender people who had been denied access to bathroom facilities were approximately 40% more likely to have

¹⁰ Human Rts. Campaign Found., *Human Rights Campaign Post-Election Survey of Youth 8* (2017) (internet).

¹¹ Kosciw et al., *The 2019 National School Climate Survey*, *supra*, at 95.

¹² *Id.* at 52, 54.

¹³ James et al., *2015 U.S. Transgender Survey*, *supra*, at 132.

¹⁴ *Id.* at 114.

attempted suicide than were other transgender people.¹⁵ Similarly, a 2021 study found that denial of access to bathroom facilities significantly increased the odds of transgender and/or nonbinary youth reporting depressive mood and attempting suicide—one in three youths who faced bathroom discrimination reported a suicide attempt in the past year.¹⁶

Suicide is not the only health risk faced by transgender youth. For example, the district court found that A.C. “sometimes tries to go the entire day without using the restroom at all,” despite the physical discomfort it causes and serious health consequences that could result. *See A.C. ex rel. M.C. v. Metropolitan Sch. Dist.*, No. 21-cv-2965, 2022 WL 1289352, at *2 (S.D. Ind. Apr. 29, 2022). Research shows that A.C.’s experience is not unique. More than four in five (82.1%) of the transgender students surveyed in one study had avoided school restrooms because they felt unsafe or uncomfortable.¹⁷ And 54% of respondents in another study of transgender people reported negative health

¹⁵ Kristie L. Seelman, *Transgender Adults’ Access to College Bathrooms and Housing and the Relationship to Suicidality*, 63 J. of Homosexuality 1378, 1388 tbl. 2 (2016) (internet).

¹⁶ Myeshia Price-Feeney et al., *Impact of Bathroom Discrimination on Mental Health Among Transgender and Nonbinary Youth*, 68 J. of Adolescent Health 1142 (2021) (internet).

¹⁷ Kosciw et al., *The 2019 National School Climate Survey*, *supra*, at 97 fig. 3.8.

effects from avoiding public restrooms, such as kidney infections and other kidney-related problems.¹⁸

Discrimination in school settings also negatively affects educational outcomes. A 2019 survey showed that LGBTQ students who had experienced discriminatory policies and practices had lower levels of educational achievement, lower grade point averages, and lower levels of educational aspiration than other students.¹⁹ Discriminatory school climates have also been found to exacerbate absenteeism. As the district court found here, the District's policy barring A.C. from using the boys' restroom caused him to be late for class, disrupted his ability to focus in school, worsened his anxiety and depression, made him feel isolated, and made "being at school painful." *See A.C.*, 2022 WL 1289352, at *2, *7 (quotation marks omitted). And a 2019 survey of LGBTQ students found that those who had experienced discrimination in their schools

¹⁸ Jody L. Herman, *Gendered Restrooms and Minority Stress: The Public Regulation of Gender and Its Impact on Transgender People's Lives*, 19 J. Pub. Mgmt. & Soc. Pol'y 65, 75 (2013) (internet); *see also Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 600, 603, 617 (4th Cir.) (transgender boy suffered painful urinary tract infection after being denied access to boys' restrooms at school), *reh'g en banc denied*, 976 F.3d 399 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021); *Adams ex rel. Kasper v. School Bd.*, 318 F. Supp. 3d 1293, 1307 & n.28 (M.D. Fla. 2018), *aff'd*, 3 F.4th 1299 (11th Cir.), *and reh'g en banc granted*, 9 F.4th 1369 (11th Cir. 2021).

¹⁹ Kosciw et al., *The 2019 National School Climate Survey*, *supra*, at 45, 48; *see also* Greytak et al., *Harsh Realities*, *supra*, at 25, 27 fig. 15 (showing that more-frequently harassed transgender students had significantly lower grade point averages than other transgender students).

based on their sexual orientation or gender identity were almost three times as likely to have missed school in the month before the survey because they felt unsafe or uncomfortable (44.1% vs. 16.4%).²⁰

Such discrimination inhibits transgender students' ability to learn, to the detriment of the broader community because education advances more than the private interests of students: it prepares young people to contribute to society socially, culturally, and economically. *See, e.g., Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

B. The Amici States' Experiences Confirm That Protecting Transgender People from Discrimination Yields Broad Benefits Without Compromising Privacy or Safety, or Imposing Significant Costs.

As noted above, at least twenty-two States and 225 localities expressly provide civil rights protections to transgender people, and those protections often include requirements that transgender people be allowed to use restrooms consistent with their gender identity. Contrary to the claims of the District (*see* Br. at 10-18) and its amici (*see* Ind. Br. at 3-6), these protections wholly comply with laws, such as Title IX, that allow segregating restrooms by sex, *see* 20 U.S.C. § 1686. These policies maintain sex-segregated spaces while allowing transgender people to use a facility that aligns with their gender identity—

²⁰ Kosciw et al., *The 2019 National School Climate Survey*, *supra*, at 49.

thus helping to ease the stigma transgender people often experience, with positive effects for their educational and health outcomes. Such policies promote compelling interests in “removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups.” *Roberts v. United States Jaycees*, 468 U.S. 609, 626 (1984). And those policies do so without threatening individual safety or privacy, or imposing significant costs.

1. Nondiscriminatory restroom policies produce important benefits and pose no safety concerns.

Supportive educational environments increase success rates for transgender students. Data from one national survey show that more-frequently harassed transgender teenagers had significantly lower grade-point averages than other transgender students.²¹

Policies supporting transgender students, including by allowing them to use common restrooms consistent with their gender identity, also can reduce the health risks facing those students. For example, California adopted protections against gender-identity discrimination in schools to address harms suffered

²¹ Greytak et al., *Harsh Realities*, *supra*, at 27 fig. 15.

by transgender students, including students not drinking and eating during the school day to avoid restroom use.²²

In States allowing transgender students to use bathrooms corresponding to their gender identity, public schools have reported no instances of transgender students harassing others in restrooms or locker rooms.²³ Indeed, the experiences of school administrators in thirty-one States and the District of Columbia show that public safety concerns are unfounded, as are concerns that students will pose as transgender simply to gain improper restroom access.²⁴ The District's speculation (Br. at 2-3, 16) that student safety will suffer if transgender people are treated fairly is thus contrary to the actual experiences of States and localities where nondiscrimination has long been the law.²⁵

²² See Assemb. B. 1266, 2013-2014 Sess. (Cal. 2013) (internet); Assemb. Comm. on Educ., Bill Analysis for Assemb. B. 1266, *supra*, at 5-6, 7 (internet); see also Alexa Ura, *For Transgender Boy, Bathroom Fight Just Silly*, Texas Trib. (June 14, 2016) (internet).

²³ Alberto Arenas et al., *7 Reasons for Accommodating Transgender Students at School*, Phi Delta Kappan (Sept. 1, 2016) (internet).

²⁴ Br. of Amici Curiae Sch. Adm'rs from Thirty-One States & D.C. in Supp. of Resp't ("School Adm'rs Br.") at 14-16, *Gloucester Cnty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 1239 (2017) (No. 16-273), 2017 WL 930055.

²⁵ Indeed, a survey of the largest school districts in twelve States with gender identity protections found that, years after implementing protections, "none of the schools have experienced any problems." Rachel Percelay, *17 School Districts Debunk Right-Wing Lies About Protections for Transgender Students*, Media Matters for Am. (June 3, 2015) (internet) (largest school districts in 12 States with gender-identity protection laws); see Carlos Maza & Luke Brinker, *15 Experts Debunk Right-Wing Transgender Bathroom Myth*, Media Matters for Am. (Mar. 19, 2014) (internet) (law
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For instance, a former county sheriff noted that Washington State has protected transgender people from discrimination for a decade “with no increase in public safety incidents as a result”; he emphasized “that indecent exposure, voyeurism, and sexual assault[] are already illegal, and police use those laws to keep people safe.”²⁶ In 2013, the Los Angeles Unified School District—the second largest school district in the country, with more than 600,000 K-12 students²⁷—reported to the California Legislature that the district had “no issues, problems or lawsuits as a result of [a 2004] policy” allowing students to use restrooms corresponding to their gender identity.²⁸ And the Massachusetts Chiefs of Police Association and Massachusetts Majority City Chiefs expressed that allowing people to use public bathrooms consistent with their gender

enforcement officials, government employees, and advocates for sexual assault victims); Luke Brinker, *California School Officials Debunk Right-Wing Lies About Transgender Student Law*, Media Matters for Am. (Feb. 11, 2014) (internet) (six of California’s largest school districts, including two that have had antidiscrimination policies for more than a decade); see also Amira Hasenbush et al., *Gender Identity Nondiscrimination Laws in Public Accommodations: a Review of Evidence Regarding Safety and Privacy in Public Restrooms, Locker Rooms, and Changing Rooms*, 16 *Sexuality Rsch. & Soc. Pol’y* 70 (2019) (internet) (comparing criminal incident reports in localities with and without gender identity inclusive public accommodations nondiscrimination laws in Massachusetts).

²⁶ David Crary, *Debate Over Transgender Bathroom Access Spreads Nationwide*, Salt Lake Trib. (May 10, 2016) (quotation marks omitted) (internet).

²⁷ Los Angeles Unified Sch. Dist., *District Information, About the Los Angeles Unified School District* (internet).

²⁸ S. Comm. on Educ., Bill Analysis for Assemb. B. 1266, *supra*, at 8 (internet).

identity “improve[s] public safety.”²⁹ Meanwhile, in Texas, officials in Austin, Dallas, and El Paso found no increase in restroom safety incidents as a result of those cities’ policies allowing transgender people to use restrooms consistent with their gender identity.³⁰

2. Nondiscriminatory restroom policies neither compromise personal privacy nor require significant expenditures.

Contrary to the claims of the District (*see, e.g.*, Br. at 10-18) and its amici (*see* Ind. Br. at 12-13), the amici States’ experiences show that nondiscriminatory policies have neither generated privacy issues nor imposed substantial costs on schools. The risk that students will see others’ intimate body parts, or have their intimate body parts seen by others, is not presented by ordinary restroom use. And in any event, concerns about the presence of others (whether or not transgender) can be addressed—and are being addressed—by increasing privacy options for all students, without singling out transgender people for stigmatizing differential treatment.

²⁹ Letter from William G. Brooks III, Mass. Chiefs of Police Ass’n, & Bryan A. Kyes, Mass. Majority City Chiefs, to Sen. William N. Brownsberger & Rep. John V. Fernandes, Joint Comm. on the Judiciary (Oct. 1, 2015) (internet).

³⁰ Carlos Maza & Rachel Percelay, *Texas Experts Debunk the Transgender “Bathroom Predator” Myth Ahead of HERO Referendum*, Media Matters for Am. (Oct. 15, 2015) (internet); *see also, e.g.*, Fox News, *Manafort on Trump’s Fight to Rally GOP, Defeat Democrats; Gov. McCrory on Showdown Over NC’s Transgender Bathroom Law* (Jan. 23, 2017) (internet) (no known cases of people in North Carolina committing crimes in bathrooms under the cover of protections provided to transgender people).

School districts in the amici States have identified a variety of cost-effective options to maximize privacy for all users of restrooms and changing facilities while avoiding discrimination. In Washington State, where school districts are required to “allow students to use the restroom that is consistent with their gender identity consistently asserted at school,” schools must provide “[a]ny student—transgender or not—who has a need or desire for increased privacy, regardless of the underlying reason,” with “access to an alternative restroom (e.g., staff restroom, health office restroom).”³¹ This gives all students with privacy concerns “the option to make use of a separate restroom and have their concerns addressed without stigmatizing any individual student.”³²

Similar provisions apply to locker rooms. Students in Washington are allowed to participate in physical education and athletic activities “in a manner that is consistent with their gender identity.”³³ But rather than segregating transgender students, additional privacy is provided for any student who desires

³¹ Susanne Beauchaine et al., *Prohibiting Discrimination in Washington Public Schools* 30 (Wash. Off. of Superintendent of Pub. Instruction 2012) (internet); see also Washington State Hum. Rts. Comm’n, *Frequently Asked Questions Regarding WAC 162-32-060 Gender-Segregated Facilities* 3 (2016) (internet) (businesses need not “make any [structural] changes” or “add additional facilities,” but “are encouraged to provide private areas for changing or showering whenever feasible” and “may wish to explore installing partitions or curtains for persons desiring privacy”); Wash. Rev. Code Ann. § 28A.642.080 (requiring implementation by January 31, 2020).

³² Beauchaine et al., *Prohibiting Discrimination*, *supra*, at 30.

³³ *Id.*; Washington Interscholastic Activities Ass’n, *2021-2022 Handbook* 36 (2021) (internet).

it, regardless of the underlying reason, by providing “a reasonable alternative changing area, such as the use of a private area (e.g., a nearby restroom stall with a door), or a separate changing schedule.”³⁴

At least twelve other States and the District of Columbia offer similar guidance to help schools maximize privacy while complying with laws prohibiting gender-identity discrimination—for instance, by offering privacy curtains and separate restroom and changing spaces to all who desire them.³⁵ None of

³⁴ Beauchaine et al., *Prohibiting Discrimination*, *supra*, at 30-31; see also Providence Pub. Sch. Dist., *Nondiscrimination Policy: Transgender and Gender Expansive Students* p. 4 (internet) (student uncomfortable with gender-segregated facility may use “a safe and non-stigmatizing alternative,” such as a privacy partition or separate changing schedule).

³⁵ **California:** California Sch. Bds. Ass’n, *Final Guidance: AB 1266, Transgender and Gender Nonconforming Students, Privacy, Programs, Activities & Facilities 2* (2014) (internet). **Colorado:** Colorado Ass’n of Sch. Bds. et al., *Guidance for Educators Working with Transgender and Gender Nonconforming Students* 4-5 (internet). **Connecticut:** Connecticut Safe Sch. Coal., *Guidelines for Connecticut Schools to Comply with Gender Identity and Expression Non-Discrimination Laws* 9-10 (2012) (internet). **Illinois:** Illinois Dep’t of Hum. Rts., *Non-Regulatory Guidance: Relating to Protection of Transgender, Nonbinary, and Gender Nonconforming Students Under the Illinois Human Rights Act* 6-7 (2021) (internet); Illinois State Bd. of Educ., *Non-Regulatory Guidance: Supporting Transgender, Nonbinary and Gender Nonconforming Students* 10-11 (2020) (internet); Affirming & Inclusive Schs. Task Force, *Strengthening Inclusion in Illinois Schools* 19-21 (2020) (internet). **Maryland:** Maryland State Dep’t of Educ., *Providing Safe Spaces for Transgender and Gender Non-Conforming Youth: Guidelines for Gender Identity Non-Discrimination* 13-14 (2015) (internet). **Massachusetts:** Massachusetts Dep’t of Elementary & Secondary Educ., *Guidance for Massachusetts Public Schools: Creating a Safe and Supportive School Environment* (Oct. 28, 2021) (internet). **Minnesota:** Minnesota Dep’t of Educ., *A Toolkit for Ensuring Safe and Supportive Schools for Transgender and Gender Nonconforming Students* 10 (2017) (internet). **New Jersey:** New Jersey State Dep’t of Educ., *Transgender Student Guidance for School Districts* 7 (2018) (internet). **New York:** New York State Educ. Dep’t, *Guidance to School Districts for Creating a Safe and Supportive School* (continued on the next page)

these solutions requires remodeling or restructuring restrooms, or otherwise investing in costly facility upgrades. As a spokeswoman for Texas’s Clear Creek Independent School District confirmed, that district, like many others, “ha[s] been successful in balancing the rights of all students without issue and offer[s] restrooms, showers and changing areas for students seeking privacy, regardless of their gender or gender identity.”³⁶ The experiences of school administrators in dozens of States across the country confirm that such policies can be implemented fairly, simply, and effectively.³⁷

Inclusive policies such as these maintain gender-segregated spaces. For example, the District of Columbia expressly requires that businesses “provide access to and the safe use of facilities that are segregated by gender” where

Environment for Transgender and Gender Nonconforming Students 9-10 (2015) (internet). **Michigan:** Michigan Dep’t of Educ., *State Board of Education Statement and Guidance on Safe and Supportive Learning Environments for Lesbian, Gay, Bisexual, Transgender, and Questioning (LGBTQ) Students* 5-6 (2016) (internet). **Oregon:** Oregon Dep’t of Educ., *Guidance to School Districts: Creating a Safe and Supportive School Environment for Transgender Students* 10-11 (2016) (internet). **Rhode Island:** Rhode Island Dep’t of Educ., *Guidance for Rhode Island Schools on Transgender and Gender Nonconforming Students* 8-9 (2016) (internet). **Vermont:** Vermont Agency of Educ., *Continuing Best Practices for Schools Regarding Transgender and Gender Nonconforming Students* 6, 8 (2017) (internet). **District of Columbia:** District of Columbia Pub. Schs., *Transgender and Gender-Nonconforming Policy Guidance* 9 (2015) (internet).

³⁶ Ura, *For Transgender Boy*, *supra* (quotation marks omitted).

³⁷ See School Adm’rs Br. at 17-21, *Gloucester Cnty. Sch. Bd.*, 137 S. Ct. 1239 (No. 16-273), 2017 WL 930055.

nudity in the presence of others is customary, while also making accommodations for transgender individuals to use the facility “that is consistent with that individual’s gender identity or expression.”³⁸ And New York’s guidance for school districts explains how schools have accommodated transgender youth and “foster[ed] an inclusive and supportive learning environment,” while maintaining sex-segregated spaces.³⁹ Contrary to the arguments advanced by the States supporting the District (Ind. Br. at 3-6), inclusive policies are thus entirely consistent with the provisions of Title IX permitting schools to maintain sex-segregated facilities.⁴⁰

In fact, it is discriminatory restroom policies rather than inclusive ones that raise privacy concerns, notwithstanding the concern expressed by the social worker at A.C.’s school to the contrary. *See* Br. at 5. Such policies are more likely to create a needless risk of violence against transgender people, whose physical appearance may diverge from their sex assigned at birth and who therefore are likely to be perceived as using the “wrong” restroom.⁴¹ In short,

³⁸ D.C. Mun. Regs. tit. 4, § 805.

³⁹ New York State Educ. Dep’t, *Guidance to School Districts for Creating a Safe and Supportive School Environment for Transgender and Gender Nonconforming Students*, *supra*, at 10.

⁴⁰ *See* 20 U.S.C. § 1686; 34 C.F.R. § 106.33 (2022).

⁴¹ *See* James et al., *2015 U.S. Transgender Survey*, *supra*, at 225-27; *see also* Matt Pearce, *What It’s Like to Live Under North Carolina’s Bathroom Law If You’re Transgender*, L.A. Times (June 12, 2016) (internet).

policies like the one at issue here, which bar transgender individuals from using a restroom that aligns with their gender identity, are more likely to pose safety and privacy concerns than inclusive policies.

II. TITLE IX AND THE EQUAL PROTECTION CLAUSE PROHIBIT THE GENDER-IDENTITY DISCRIMINATION IN THIS CASE

The District and its amici mischaracterize the central issue in this case as whether sex-segregated bathrooms violate the Equal Protection Clause or Title IX. A.C. has never disputed a school's authority to separate bathrooms by sex. Rather, the key question in this case is instead whether "the alleged facts, if true, raise a plausible [inference] that [the District] discriminated against [A.C.] on the basis of sex?" *A.C.*, 2022 WL 1289352, at *3 (quotation marks omitted). Relying on this Court's precedent in *Whitaker ex rel. Whitaker v. Kenosha Unified School District No. 1 Board of Education*, the district court correctly answered that question in the affirmative. *See* 858 F.3d 1034 (7th Cir. 2017). As the court properly determined, "discrimination against a person on the basis of their transgender status constitutes discrimination based on sex," and A.C. was likely to succeed on his claims that he had been discriminated against based on his sex. *A.C.*, 2022 WL 1289352, at *3, *6.

The district court correctly applied *Whitaker* as the controlling precedent. There is no meaningful difference between the facts in *Whitaker* and those presented here. The plaintiffs in both cases are transgender male students who

were designated female at birth. Both plaintiffs were diagnosed with gender dysphoria and were under medical care to suppress developing female secondary sex characteristics. Both plaintiffs consistently presented as boys for four years prior to suing their respective schools for denying them access to the boys' restrooms. And both plaintiffs experienced similar harms from that denial, such as missing class time and experiencing anxiety, depression, and stigmatization. Indeed, for a time, both boys defied school orders and used the boys' restrooms with no complaints from students. *Compare Whitaker*, 858 F.3d at 1040-42, 1052, *with A.C.*, 2022 WL 1289352, at *1-2.

The similarities between *Whitaker* and the current case also extend to the defendant school districts' positions. For example, in neither case did the defendant school district present any evidence that the presence of a transgender boy in the boys' bathroom threatened, much less violated, the privacy rights of other students. *Whitaker*, 858 F.3d at 1052; *A.C.*, 2022 WL 1289352, at *7. Given such similar facts between the two cases, the district court properly applied *Whitaker* in holding that A.C., like the plaintiff in *Whitaker*, had demonstrated a likelihood of success on the merits of his claim that the District discriminated against him on the basis of sex in violation of Title IX and the Equal Protection Clause. *A.C.*, 2022 WL 1289352, at *6; *see Whitaker*, 858 F.3d at 1050, 1054. The District plainly and unlawfully discriminates based on sex because it does not and cannot explain its reasons for excluding A.C. from using

the bathrooms that align with his gender identity without referencing A.C.'s "biological sex" or conformity with it. *See Whitaker*, 858 F.3d at 1049, 1051; Br. at 8.

Consistent with *Whitaker*, other courts, including the Supreme Court in *Bostock v. Clayton County*, have found that gender identity discrimination is necessarily sex discrimination.⁴² *See* 140 S. Ct. at 1741-42, 1745-47; *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (citing cases). As the Supreme Court explained, discriminating against a person for being transgender is sex discrimination because "[i]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Bostock*, 140 S. Ct. at 1741. For example, a person who is discriminated against for identifying as female simply because she was identified as male at birth is necessarily being discriminated against based on sex—i.e., she would not be treated differently than other females if not for the fact that her designated sex at birth was male. *Id.* In reaching its conclusion, the Supreme Court acknowledged that "transgender status" is a distinct concept from "sex," but observed that sexual harassment and discrimination based on

⁴² When determining whether conduct constitutes discrimination based on sex under Title IX, courts routinely look to and apply case law interpreting Title VII. *See, e.g., Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 636, 651 (1999); *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 75 (1992).

motherhood are also distinct concepts that, unquestionably, still qualify as sex discrimination. *Id.* at 1742, 1746-47.

Applying much the same reasoning as in *Bostock*, courts have correctly recognized that Title IX's bar against sex discrimination prohibits policies that, like the District's policy here, bar transgender students from using the bathroom that aligns with their gender identity. As these courts have correctly explained, the discriminator is necessarily referring to an individual's sex assigned at birth to deny access to a bathroom that aligns with their gender identity. *See Grimm*, 972 F.3d at 616-19; *Dodds v. United States Dep't of Educ.*, 845 F.3d 217, 221-22 (6th Cir. 2016); *see also Parents for Privacy v. Barr*, 949 F.3d 1210, 1228-29 (9th Cir.) (transgender students' use of sex-segregated spaces that align with their gender identity does not violate Title IX rights of cisgender students), *cert. denied*, 141 S. Ct. 894 (2020); *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 534-35 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 2636 (2019).⁴³ Thus, a policy that denies a transgender boy, for example, access to the boys' bathroom violates Title IX's prohibition against sex discrimination because it treats the transgender boy differently than other students who

⁴³ *See also N.H. v. Anoka-Hennepin Sch. Dist. No. 11*, 950 N.W.2d 553, 563-64 (Minn. Ct. App. 2020) (considering Title IX precedents to interpret Minnesota anti-discrimination statute).

identify as boys, simply because of the sex they were assigned at birth. The district court did not err in reaching the same conclusion here.

The District's policy needlessly denies A.C. something most people take for granted: the ability to use a public restroom consistent with one's lived experience of one's own gender. The policy singles out transgender students like A.C. and forces them either to forgo restroom use or to choose between two other detrimental options: using common restrooms corresponding to their sex assigned at birth or using special single-user restrooms (i.e., those with no specific gender designation). The first option contravenes a core aspect of transgender people's identities, subjects them to potential harassment and violence, and violates medical treatment protocols. The second option stigmatizes the person—like “outing” individuals as transgender in settings where they could be exposed to danger or prefer to keep that information private—assuming that single-user restrooms are even available and equally convenient.⁴⁴ See *A.C.*, 2022 WL 1289352, at *7.

⁴⁴ The same concerns are not posed by the privacy-enhancing measures described above (see *supra* at 15-17), which are available to all students who desire additional privacy. Such measures do not single out or stigmatize transgender students, and thus do not force students into the untenable choice presented by the kind of policy at issue here.

Contrary to the arguments of the District (*see, e.g.*, Br. at 10-14) and its amici (*see, e.g.*, Ind. Br. at 3-6), there is no regulatory basis for such stigmatizing discrimination. In permitting “separate toilet, locker room, and shower facilities on the basis of sex,” 34 C.F.R. § 106.33, Title IX’s implementing regulation does not require segregation of the enumerated facilities exclusively on the basis of “biological sex” (*see, e.g.*, Br. at 21-22, 24). Neither Title IX nor its implementing regulations define “sex” in terms of biological sex. In fact, as courts have uniformly recognized, “sex” incorporates gender identity (*see supra* at 21-22), and Title IX’s statutory language broadly prohibits discrimination on the basis of sex—including gender identity, 20 U.S.C. § 1681(a). The District’s interpretation of 34 C.F.R. § 106.33 is accordingly unreasonable and must fail. *See United States v. Larionoff*, 431 U.S. 864, 873 (1977) (“[R]egulations, in order to be valid must be consistent with the statute under which they are promulgated.”); *Manhattan Gen. Equip. Co. v. Comm’r*, 297 U.S. 129, 134 (1936) (a regulation that “operates to create a rule out of harmony with the statute” is “a mere nullity”). Title IX and its implementing regulations require the District to forgo discrimination against students based on transgender status, regardless of whether they are in a classroom, bathroom, or other location at school. As the amici States’ successful experiences demonstrate (*see supra* at 10, 17-18), schools may continue to have sex-segregated restrooms while allowing transgender students to use the bathroom that matches their gender identity.

And under those circumstances, female students still use the girls' restrooms and male students still use the boys' restrooms.

For similar reasons, the District's bathroom policy contravenes the Equal Protection Clause. The Supreme Court has long made clear that equal protection prohibits government policies that serve only to express "negative attitudes" "or fear" toward people viewed as "different." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985); *see also Nguyen v. Immigration & Naturalization Serv.*, 533 U.S. 53, 68 (2001) (the Equal Protection Clause bars a decision built on stereotypes and a "frame of mind resulting from irrational or uncritical analysis"). The policy at issue here falls squarely into this category.

As the district court noted,

[w]hile A.C. has provided evidence of the harm he will likely suffer, the School District's alleged potential harm is unsupported. No student has complained concerning their privacy. The School District's concerns with the privacy of other students appears entirely conjectural. No evidence was provided to support the School District's concerns, and other courts dealing with similar defenses have also dismissed them as unfounded.

A.C., 2022 WL 1289352, at *7 (citing *Whitaker*, 858 F.3d at 1052; *J.A.W. v. Evansville Vanderburgh Sch. Corp.*, 323 F. Supp. 3d 1030, 1041 (S.D. Ind. 2018)).

And while the district court acknowledged "that the public interest favors

furthering individual privacy interests, the Court does not believe that granting A.C. access to the boys' restrooms threatens those interests." *Id.* at *8. See *supra* at 10-19.

In contrast, the full evidentiary record shows that the harm the policy causes to A.C. is real. The District's policy stigmatizes A.C., "worsens the anxiety and depression" that he already feels because of his gender dysphoria, and "makes being at school painful" and isolating. *A.C.*, 2022 WL 1289352, at *7 (quotation marks omitted). A.C.'s mother worries about the emotional harm to A.C. and "the possible medical risks associated with him trying not to use the restroom during school." *Id.* "Like other courts recognizing the potential harm to transgender students," the district court found "no reason to question the credibility of A.C.'s account and that the negative emotional consequences with being refused access to the boys' restrooms constitute irreparable harm that would be difficult—if not impossible—to reverse." *Id.* (quotation marks omitted). Under well-established constitutional analysis, such discrimination cannot withstand any level of equal protection scrutiny.

CONCLUSION

This Court should affirm the decision below.

Dated: New York, New York
August 2, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Kelly Cheung, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 6,442 words and complies with the typeface requirements and length limits of Rules 29 and 32(a)(5)-(7) and the corresponding local rules.

*/s/ Kelly Cheung*_____

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was filed electronically with the Court's CM-ECF system on August 2, 2022.

Service will be effectuated by the Court's electronic notification system upon all parties and counsel of record.

Dated: New York, New York
August 2, 2022

 /s/ Mark S. Grube